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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

NO. 964

313 U.S. #2
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WILLIAM LARIMER MELLON and THOMAS MELLON, Executors of the Will of James R. Mellon, Deceased, Petitioners,

v.

WILLIAM DRISCOLL, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, BRIEF, AND APPENDIX.

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v.

WILLIAM DRISCOLL, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of WILLIAM LARIMER MELLON and THOMAS MELLON, Executors of the Will of JAMES R. MELLON, Deceased, respectfully shows:

Matter Involved.

This is an action at law, instituted in the District Court of the United States for the Western District of Pennsylvania by your petitioners, hereinafter also referred to as plaintiffs, against respondent, hereinafter referred to as defendant, for refund of additional fed-

eral estate taxes assessed by the Commissioner of Internal Revenue against the Estate of James R. Mellon, who died on October 20, 1934, leaving a will on which letters testamentary were issued to your petitioners (R. 2, 3).

The case was tried before District Judge McVicar, without a jury, and resulted in a judgment against the plaintiffs and in favor of the defendant (R. 2).

On appeal by plaintiffs to the Circuit Court of Appeals for the Third Circuit, this judgment was affirmed in an opinion by Circuit Judge Clark (R. 22, 28).

The amount of additional federal estate taxes, with interest, paid by plaintiffs, for which refund is sought, is $56,148.

The tax was assessed on the value, at the date of decedent's death, of property transferred by decedent on December 1, 1917, by two deeds of trust, and on minor additional transfers thereunder in 1932 and 1933, less the value of the life estates granted thereby (R. 5, 6).

The two deeds of trust were identical in all respects, except that one was made for the benefit of decedent's daughter and the other for the benefit of his son, both of whom are still living.

In the deed for the benefit of the daughter, Mrs. Grange (now Hasbrouck), decedent transferred securities to The Union Trust Company of Pittsburgh, as Trustee, in trust, to pay the income to her for life and upon her death to distribute the principal to such person or persons or corporation as she should by will direct, and in the absence of such direction, to such person or persons as would take the same as her heirs under the intestate laws of Pennsylvania. This deed contained the following provision (R. 19):

"The party of the first part hereby reserves the right after six months written notice of his intention so to do, served on the party of the second part [the Trustee], to revoke this trust, whereupon the principal of the trust fund shall be distributed to S. LUCILLE MELLON GRANGE [life beneficiary with general testamentary power of appointment over remainder] and the trust shall end."

The deed for the benefit of the son, Thomas Mellon, is identical, except that his name appears therein in the place of the name of S. Lucille Mellon Grange (R. 16-17).

The District Court found as facts that none of the property transferred by the decedent under the said deeds of trust was transferred in contemplation of death, that decedent never exercised the power reserved by him to terminate the trusteeship with the provision that the trust should thereupon end and the trust fund be distributed to the beneficiary, and that the decedent never gave the six months' written notice to the Trustee of his intention to end the trusteeship, which was required as a condition precedent to the right to end such trusteeship (R. 4, 5, 6).

These facts were not controverted by the Circuit Court of Appeals (R. 22).

Although plaintiffs contended that the reserved power was not a power to revoke, because decedent could not recapture the trust property, the District Court held that the remainder interests under the trusts were taxable under Section 302 (d) of the Revenue Act of 1926, as amended by the Revenue Act of 1934 (R. 7).

In affirming the judgment of the District Court, the Circuit Court of Appeals, in an opinion by Circuit Judge Clark, held that decedent had retained a power to revoke within the meaning of Section 302 (d) of the Revenue

Act of 1926, as amended by the Revenue Act of 1934 (R. 28).

Jurisdiction.

The Circuit Court of Appeals affirmed the judgment of the District Court February 3, 1941.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 § 1, 43 Stat. 938; U. S. C. A., Title 28, Section 347.

Questions Presented.

1. Where the donor of a trust has no power to change the beneficiaries or to recapture the trust property, but only a power to terminate the trusteeship, whereupon the property is to be distributed to the beneficiary, who has a life estate, with general testamentary power to appoint the remainder, should the value of such remainder interest be included in the donor's gross estate under Section 302 (d) of the Revenue Act of 1926, as amended by the Act of 1934?

2. Should the value of a transfer *inter vivos* be included in the transferor's gross estate under the provisions of the 1934 Amendment to Section 302 (d) of the Revenue Act of 1926, enacted subsequent to the transfer and not made applicable by its terms to prior transfers?

Reasons for Allowance of Writ.

I.

The decision of the Circuit Court of Appeals is a decision of a federal question probably in conflict with the rule established by this Court in the case of *Sanford v. Commissioner,* 308 U. S. 39, and with the Amended Regulations promulgated by the Commissioner of Internal Revenue putting that rule into administrative practice.

The *Sanford case* and the Amended Regulations prescribe the criteria for determining whether a transfer in trust with reserved powers is subject to the Gift Tax or the Estate Tax.

The fundamental question presented by the case at bar is whether a transfer in trust of the kind in suit is subject to the Gift Tax or to the Estate Tax. Its answer depends on whether or not the power reserved by the decedent renders the transfer incomplete.

The rule established by the *Sanford case* and the Amended Regulations is that a transfer of property upon trust, with power to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than the donor, is incomplete; but that the reservation of power merely to change the manner or time of enjoyment of the transferred property does not render the transfer incomplete.

Decedent did not reserve the power to recapture the trust property or to designate new beneficiaries, but only a power to change the manner and time of enjoyment of the transferred property. The power reserved did not, therefore, render the transfer incomplete.

Both the *Sanford case* and the Amended Regulations are based on the axiom that where the power reserved does not render the transfer incomplete, the transfer is subject to the Gift Tax and not the Estate Tax.

The Circuit Court of Appeals, however, held that the transfer was subject to the Estate Tax.

The opinion of the Circuit Court of Appeals fails to mention this contention or to cite the *Sanford case* and the Amended Regulations, although they formed the basis of plaintiffs' principal argument in that Court.

II.

The decision of the Circuit Court of Appeals is in conflict with administrative interpretation and practice in assessing the Gift Tax and Estate Tax.

As applied to transfers *inter vivos*, these two taxes are *in pari materia* and mutually exclusive, except in the case of transfers in contemplation of death. The *Sanford case* enunciated a rule which brought clarity and consistency into the determination of which tax was applicable.

That rule has been carried into administrative practice by the promulgation of regulations and forms of return relating to the Gift Tax. That practice, now in effect and of nation-wide application, will be upset, if the decision in the case at bar is not reversed.

III.

The decision of the Circuit Court of Appeals is a decision of a federal question probably in conflict with the decision of this Court in the case of *Hassett v. Welch,* 303 U. S. 303, and with other applicable decisions of this Court.

In the *Welch case* this Court held that the 1931 Amendment to Section 302 (c) of the Revenue Act of 1926 should not be retroactively applied to a transfer made prior to its enactment, because the Amendment was not made retroactive by its terms.

The Circuit Court of Appeals in the case at bar retroactively applied the 1934 Amendment to Section 302 (d) of the Revenue Act of 1926 to transfers made prior to its enactment, although the Amendment was not made retroactive by its terms.

The opinion of the Circuit Court of Appeals fails to mention this contention or to cite the *Welch case,* although they formed the basis of one of plaintiffs' main arguments in that Court.

The position of your petitioners is further elaborated in a supporting brief submitted herewith.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue out of and under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the Record of all proceedings in said Circuit Court of Appeals, in the case entitled, "WILLIAM LARIMER MELLON and THOMAS MELLON, Executors of the Will of JAMES R. MELLON, Deceased, Plaintiffs-Appellants, v. WILLIAM DRISCOLL, Collector of Internal Revenue for the Twenty-

third District of Pennsylvania, Defendant-Appellee, No. 7438", to the end that said case may be reviewed and determined by this Court, that the judgment of the Circuit Court of Appeals for the Third Circuit may be reversed by this Court, and that your petitioners may have such other and further relief as to this Court may seem proper.

WILLIAM LARIMER MELLON and THOMAS MELLON, Executors of the Will of JAMES R. MELLON, Deceased.

.....

By WM. S. MOORHEAD,

.....

WM. F. KNOX,
Their Attorneys.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The Opinion of the District Court is not officially reported. It appears in the Record, at page 8.

The Opinion of the Circuit Court of Appeals is reported in 117 Fed. (2d) 477. It appears at page 22 of the Record.

Jurisdiction.

See Petition for Writ of Certiorari, "Jurisdiction", page 4, *supra.*

Statement of the Case.

See Petition for Writ of Certiorari, "Matter Involved", pages 1 to 4, *supra.*

Specification of Errors to Be Urged.

1. The Circuit of Appeals erred in holding that where the donor of a trust has no power to change the beneficiaries or to recapture the trust property, but only a power to terminate the trusteeship, whereupon the property is to be distributed to the beneficiary, who has a life estate with general testamentary power to appoint the remainder, the value of such remainder interest should be included in the donor's gross estate under Section 302 (d) of the Revenue Act of 1926, as amended by the Act of 1934.

2. The Circuit Court of Appeals erred in holding that the value of a transfer *inter vivos* should be included in the transferor's gross estate under the provi-

sions of Section 302 (d) of the Revenue Act of 1926, as amended by the Revenue Act of May 10, 1934, the said Amendment having been enacted subsequent to the transfer and not having been made applicable by its terms to prior transfers.

SUMMARY OF ARGUMENT.

I.

The power retained by the decedent was merely to put an end to the trusteeship, whereupon the trust property would go to the beneficiary, who already was entitled to the income for life and had a general testamentary power of appointment over the remainder.

Such a power does not render the transfer incomplete and subject to the Estate Tax; because it is not a power to revoke and recapture the trust property or to modify the terms of the trust, so as to designate new beneficiaries or to change the proportionate interests of the named beneficiaries. The retention of such a power is necessary to render the transfer incomplete and subject to the Estate Tax, as established by the rule laid down in the *Sanford case* and put into administrative practice by the regulations of the Treasury Department.

The power retained by the decedent was, at most, a power to change the manner and time of enjoyment of the trust property. As set forth in the amended Gift Tax Regulations, such a power does not render the gift incomplete. It remains subject to the Gift Tax; but is not subject to the Estate Tax.

The decedent's death passed no assurance of title or property to any one; because the beneficiaries, not the decedent, had complete control of the estates in remainder.

II.

The decision of the Circuit Court of Appeals is in conflict with administrative interpretation and practice in assessing the Gift Tax and Estate Tax. Under the form of Gift Tax return promulgated by the Treasury Department, the donor of a trust, subject to a power such as was reserved by the decedent, must return the trust property and pay the Gift Tax based on the value thereof. Being subject to the Gift Tax, the transfer would not be subject to the Estate Tax, under the rule in the *Sanford case.*

Under the decision of the Circuit Court of Appeals in the case at bar, on the other hand, the transfer would be subject to the Estate Tax and, therefore, not subject to the Gift Tax.

III.

At the time of his death, decedent had no power of any kind over the trusts. The exercise of the retained power was subject to a precedent giving of notice to the Trustee, which he never gave. A power subject to such a condition precedent was not reached by the Estate Tax law until the Amendment of 1934, passed seventeen years after the trusts were created. Since the Amendment was not made retrospective by its terms, it is not applicable to transfers prior to its enactment under the decision of this Court in *Hassett v. Welch,* 303 U. S. 303. The decision in the case at bar is in conflict with the decision in the *Welch case.*

ARGUMENT.

Section 302 (d) of the Revenue Act of 1926, as amended by the Revenue Act of 1934.

The Commissioner of Internal Revenue included in the gross estate of the decedent the value of remainders after the death of the life beneficiaries in the two *inter vivos* trusts created by decedent in 1917, to which minor additional transfers were made by decedent in 1932 and 1933. The assessment was justified by the Commissioner and upheld by the District Court and Circuit Court of Appeals, under Section 302 (d) of the Revenue Act of 1926 (44 Stat. 71), as amended by Section 401 of the Revenue Act of May 10, 1934 (48 Stat. 752).

The relevant parts of Section 302 (d) of the Revenue Act of 1926, as thus amended, are set forth in the Appendix hereto, page 26.

I.

The Power Retained by the Decedent Did Not Render the Transfers Incomplete and Subject to the Estate Tax.

The trusts in suit were created in 1917 (R. 15, 17). There is nothing whatsoever to suggest that they were made in an effort to avoid the Estate Tax. Contrary to Judge Clark's statement that the beneficiaries were minors when the trusts were created (R. 22), they were then thirty-seven and thirty, respectively (R. 6). It can not be asserted that the trusts were made by a father in discharge of a legal liability to support minor children. The deeds of trust were executed seven years prior to the time when the section corresponding to Section 302 (d) of the 1926 Act (the asserted basis of the tax) first appeared in a Revenue Act.

In each trust decedent transferred to the Trustee securities in trust, to pay the income to the beneficiary for life and, on the beneficiary's death, to distribute the trust property to such persons or corporations as the beneficiary should appoint by will. The only power retained by the decedent was, as follows (R. 19).

> "The party of the first part [the decedent] hereby reserves the right after six months written notice of his intention so to do, served on the party of the second part [the Trustee], to revoke this trust, whereupon the principal of the trust fund shall be distributed to S. LUCILLE MELLON GRANGE [life beneficiary with general testamentary power of appointment over remainder] and the trust shall end."

[Thomas Mellon is the beneficiary in the other trust (R. 17)].

In spite of his inept use of the word "revoke", decedent reserved neither a power to revoke and recapture the trust property nor a power to modify its terms so as to designate new beneficiaries.

Decedent's only power was to remove the trust with which the transferred property was clothed and cause the property to be distributed to the one person who already had a life estate and sole control over the disposition of the remainder. It is no refinement of terms to state that this was merely a power to terminate the trusteeship and thereby to affect the time and manner of the beneficiary's enjoyment of the trust property.

The question with reference to a transfer such as this is not whether it is taxable; but whether it is the kind of transfer that is subject to the Gift Tax or to the Estate Tax.

In the case of *Sanford v. Commissioner*, 308 U. S. 39, and the companion case of *Rasquin v. Humphreys*, 308 U. S. 54, this Court, in carefully considered opinions by Mr. Justice Stone, set forth the criteria by which a trust should be subjected to the Gift Tax, on the one hand, or to the Estate Tax, on the other.

The Attorney General asserted and this Court affirmed that the Estate Tax and the Gift Tax were *in pari materia* and mutually exclusive, except in the case of gifts in contemplation of death, with which we are not here concerned.

The cases above cited concerned certain powers retained by donors in the creation of trusts. The Commissioner could not determine whether the Government revenues would be increased by a decision that the kind of powers retained rendered the gifts in trust incomplete and, therefore, subject to the Estate Tax or that the gifts were complete and, therefore, subject to the Gift Tax. The latter tax is collectible at once and absolutely; while the former is collectible sometime in the future and peradventure.

The Government stated that it had taken inconsistent positions in the two cases above cited and requested that the resulting confusion be settled by this Court in the interest of consistent administration of the revenue laws.

The question involved was whether a specified power retained by the donor rendered the transfer incomplete and, therefore, subject to the Estate Tax, or did not affect the completeness of the transfer and, therefore, rendered it subject to the Gift Tax.

The rationale of the two decisions is that an incomplete transfer is not subject to the Gift Tax, but is

subject to the Estate Tax. A complete transfer is subject to the Gift Tax, but not to the Estate Tax.

In enunciating the rule for determining what transfers are subject to the Gift Tax, on the one hand, or to the Estate Tax, on the other, Mr. Justice Stone said (p. 43):

> "The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with power reserved to the donor either *to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries* other than himself is incomplete, and becomes complete so as to subject the transfer to death taxes only on relinquishment of the power at death." (Italics supplied)

It is therefore established that if a power is reserved to revoke a trust and recapture the trust property, or to modify the trust so as to designate new beneficiaries, the transfer is incomplete, is subject to the Estate Tax, and is not subject to the Gift Tax. It becomes subject to the Gift Tax, if the power is relinquished by the donor during his lifetime.

It follows that if no such power to recapture or to modify is reserved when the transfer is made—and no such power was reserved in the case at bar—the transfer is subject to the Gift Tax, when made, and is not subject to the Estate Tax on the death of the donor.

As we read the opinion of Judge Clark (R. 22), the decision of the Circuit Court of Appeals is based on the proposition that decedent had retained a power to bring the trust to an untimely end and that this power rendered the transfer taxable, regardless of the subsequent fate of the corpus; that is to say, regardless of the fact

that putting an end to the trusteeship did not result in the recapture of the trust property by the donor or the transfer thereof to new beneficiaries. The opinion concludes, as follows (R. 28):

> "It is clear that revocation is but a method of bringing a trust to an untimely end and has no relation to the consequent and subsequent fate of its corpus. The 'calling back' is of time rather than of space. It seems unnecessary to be troubled by the Treasury's doubts as to the kind of termination or to resort to their ascription of the word itself to 'alter' rather than to 'revoke'."

Under the rule in the *Sanford case,* the fate of the corpus is the touchstone by which it is to be determined whether a retained power renders a transfer in trust incomplete and subject to the Estate Tax or complete and subject to the Gift Tax. It is the power to recapture the corpus, or to transfer it to different beneficiaries, that makes the transfer incomplete. Under the Amended Gift Tax Regulations, as we are about to demonstrate, a mere change in the time or manner of enjoyment of the corpus does not affect the completeness of the transfer and the Gift Tax is incident—not the Estate Tax. The Circuit Court of Appeals sets up time, not space, as the criterion.

We submit that the rule of the Circuit Court of Appeals in the case at bar conflicts with the rule in the *Sanford case.*

The 1940 Amendment to the Gift Tax Regulations.

After this Court's decision in the *Sanford case,* with which existing Gift Tax Regulations were at variance, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated an amend-

ment to those Regulations putting into administrative practice the rule laid down in the *Sanford case.*

No reference to the Amendment or to plaintiffs' position based thereon is contained in Judge Clark's Opinion (R. 22).

This Amendment contains the following precept:

"A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof." [Appendix p. 28].

The retention of such power, therefore, would not render the property transferred subject to the Estate Tax.

The Amendment in question is to Article 3 of Regulations 79, relating to the Gift Tax. That Article, as so amended, is set forth in the Appendix hereto, page 27.

In the case at bar the power reserved by the decedent was, only and at most, power to change the time and manner in which the transferred property could be enjoyed by the beneficiary of the income for life, who had a general testamentary power of appointment over the remainder.

He had an estate tantamount to a fee.

The Supreme Court of Pennsylvania has held that where a testator gives a general testamentary power of appointment to a life tenant—

"* * * the testator has completely relinquished all dead hand dominion over the property and has placed it for all practical purposes as completely within the control of the donee of the power as though a fee had been created in him."

(*Lyon et al. v. Alexander,* 304 Pa. 288, 292; 156 Atl. 84).

In *Wilbur's Estate*, 334 Pa. 45; (5 Atl. (2d) 325), the Supreme Court of Pennsylvania said further, at page 53:

> "A life tenant with a general power of appointment has an estate tantamount to a fee; no one but the donee has any interest in such a power * * *."

"Taxation", Mr. Justice Holmes said, "is not so much concerned with the refinements of title as it is with actual command over the property taxed." (*Corliss v. Bowers*, 281 U. S. 376, 378).

It was not the purpose of Congress, under Section 302 (d), to subject to the Estate Tax transfers where the transferee was for practical purposes the owner of the property. Rather it was the purpose of Congress to tax transfers where the transferor remained for practical purposes the owner. This clearly appears in the Report of the Ways and Means Committee of the House on the proposed Amendment to Section 302 (d) of the Revenue Act of 1926 by the Revenue Act of 1934 (1940 C. C. H. Vol. 3, page 6142). It was there said:

> "This section [Sec. 401, 1934 Act] amends section 302 (d) of the Revenue Act of 1926 relating to the inclusion in the gross estate of a decedent of property transferred by him but as to which he retains the right to alter, amend, or revoke. *In such cases the decedent is for practical purposes the owner of the property which under existing law is required to be included in his gross estate.*" (Italics supplied)

Since in the case at bar the beneficiary, and not decedent, was "for practical purposes the owner of the property", Section 302 (d) is inapplicable.

In the case of *Porter v. Commissioner,* 288 U. S. 436, the basis for the application of Section 302 (d) was that the donor's death passed a valuable assurance of title. The decedent's death, in the case at bar, passed no assurance of title or property to any one. The estates in remainder, included in decedent's gross estate by the Commissioner, were subject to general testamentary powers of appointment by the respective beneficiaries. No one in the world had any assurance that this power of appointment would be exercised for his benefit or would be exercised at all. The reason is that the beneficiary and not the decedent had complete control of the estate in remainder.

We submit that there is no logical or realistic basis for the assessment of the Estate Tax on the transfers in suit or any part thereof and that such an assessment violates the rule laid down in the *Sanford case* and put into administrative practice by the Amended Gift Tax Regulations.

II.

The decision of the Circuit Court of Appeals is in conflict with administrative interpretation and practice in assessing the Gift Tax and Estate Tax.

The *Sanford case* enunciated the rule by which to determine whether a transfer upon trust, with a reserved power, is incomplete and subject to the Estate Tax or complete and subject to the Gift Tax.

Not only has this rule been put into administrative practice by amendment to the Gift Tax Regulations (Appendix p. 27), above referred to, but also by the Gift Tax Returns.

The form of Gift Tax Return (Form 709) prepared by the Treasury Department, on which donors are re-

quired to report transfers in trust, or otherwise, without consideration, was revised in October 1940. The changes in the interrogatories are substantial. They were manifestly made to carry out the Amended Regulations promulgated to put into administrative practice the rule in the *Sanford case.*

Under the Gift Tax Return (as revised), the donor of a transfer in trust, similar to those in the case at bar, would be required to report such transfer as subject to the Gift Tax.

Eliminating irrelevant phrases where indicated, the first interrogatory in the Return is as follows (C. C. H. 1941 Inheritance, Estate, and Gift Tax Service, p. 4903):

> "Have you * * * without * * * consideration * * * made any transfer * * * as follows? (Answer 'Yes' or 'No')
> 1. By the *creation* of a trust (or the *making of additions* to a trust previously created) for the benefit of a person or persons, other than yourself, and with respect to which you retain no power to revest the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits, or by *relinquishing* every such power that was retained in a previously created trust .....:
>
> * * * * * * *
>
> "If the answer is 'Yes' to any of the foregoing, such a transfer should be fully disclosed under Schedule A."

In the Return, the Gift Tax is assessed on the value of the transfer shown in Schedule A, less statutory exclusions and exemption.

It is immediately apparent that the donor of a trust, reserving a power like that with which we are concerned, would have to answer the first interrogatory "Yes", and to compute his Gift Tax on the value of the transfer made by the trust.

This is true, because the donor in the instant trusts retained no power to revest the beneficial title to the property in himself or to change the beneficiaries or their proportionate benefits.

But, if such a transfer is subject to the Gift Tax, it is not subject to the Estate Tax, under the rule in the *Sanford case.*

Under the administrative practice of the Treasury Department, a transfer in trust, with a retained power such as that retained by plaintiffs' testator, is, therefore, subject to the Gift Tax. It is, consequently, not subject to the Estate Tax.

But this is contrary to the decision of the Circuit Court of Appeals in the case at bar.

Either the rule in the *Sanford case* must, therefore, be scrapped and the Regulations and forms of Gift Tax Return, promulgated by the Treasury Department, changed; or the decision in the case at bar must be reversed.

A serious, though curious, situation might arise if the forms of Gift Tax return were not changed and the decision of the Circuit Court of Appeals were allowed to stand. This would be that situation—

The donor of a trust retains a power similar to that retained by plaintiffs' testator. Under the Circuit Court

of Appeals decision, the donor would not be subject to the Gift Tax, because he is subject to the Estate Tax.

The donor later relinquishes the retained power. He would not be required to report the relinquishment of such a power for taxation under the Gift Tax Return.

This becomes apparent by reference to the first interrogatory in the Gift Tax Return, above quoted. The donor would properly answer "No" to it; because he had not relinquished a power "to revest the beneficial title to the property in yourself [himself] or to change the beneficiaries or their proportionate benefits."

The transfer would not be subject to the Estate Tax on the donor's death, because he had theretofore relinquished all power originally retained.

We submit that the decision of the Circuit Court of Appeals is not only in conflict with the rule in the *Sanford case,* but would disrupt the administrative practice putting that rule into effect.

III.

The 1934 Amendment to the Revenue Act of 1926 Should Not Be Applied Retrospectively to Transfers Made prior to its Enactment.

We have heretofore argued that the power retained by decedent was not of the kind referred to in Section 302 (d) (1), because it was not a power to revoke and recapture the trust property or to designate new beneficiaries.

Quite aside from this proposition, Section 302 (d) is not applicable to the trusts in suit for the reason that the transfers were not subject even to a power to ter-

minate the trusteeship *at the time of the death of the decedent,* it being recalled that Section 302 (d)(1) requires that the transfer be "subject *at the date of his death* to any change through the exercise of a power, * * * to alter, amend, or revoke, * * *." [Italics supplied] (Appendix p. 26).

The transfers made by decedent were not subject to any power at the date of his death; because he had never given the six months' written notice to the Trustee, which was a condition precedent to decedent's exercising his power (R. 6).

The 1934 Amendment to Section 302 (d), which added Sub-section (2), did purport to reach a transfer where a power to alter, amend, or revoke was subject to such a condition precedent (Appendix p. 26). But the 1934 Amendment was passed seventeen years after the original transfers were made by decedent and, incidentally, only five months and ten days prior to his death on October 20, 1934. The Amendment was not made retrospective by its terms, and therefore, as a matter of statutory construction, should not be applied to transfers made prior to its enactment.

The principle underlying this contention was applied by this Court in the case of *Hassett v. Welch,* 303 U. S. 303.

In that case it was held that, as a matter of statutory construction, the 1931 Amendment to Section 302 (c) of the 1926 Act did not apply to *inter vivos* transfers made prior to its enactment. It was contended by the Collector that the Amendment should be applied to past transactions, because of the provision of Section 302 (h) of the Revenue Act of 1926 making subdivisions (b), (c), (d), (e), (f) and (g) of Section 302 retroactive.

This Court, in an opinion by Mr. Justice Roberts, held that the retroactive provisions of Section 302 (h) of the Act of 1926 applied to the transfers described in Section 302 (c) of the 1926 Act, but not to transfers described in the 1931 Amendment. Since Section 302 (h) of the 1926 Act was not re-enacted in the 1931 Amendment, and since the Amendment was not otherwise made retrospective by its terms, it was held that the Amendment applied only to *inter vivos* transfers made after its enactment.

This is the identical situation presented in the case at bar. The 1934 Amendment, which added Sub-paragraph (2) to Section 302 (d) of the Act of 1926, did not re-enact Section 302 (h) of the 1926 Act and did not contain any provision making the 1934 Amendment retrospective: 48 Stat. 752.

It is, therefore, apparent that the 1934 Amendment applies only to transfers made after its enactment and does not apply to the transfers made by decedent in the case at bar.

In his opinion for the Circuit Court of Appeals, Judge Clark did not cite the *Welch case* or allude to plaintiffs' written and oral argument in that Court based thereon. But, as has been seen, the decision of the Circuit Court of Appeals is directly in conflict with the principle applied in the *Welch case.*

The effect of the retrospective application of the 1934 Amendment would be to impose an Estate Tax on property which the donor thereof had parted with years before, could not recapture, and could not redistribute. That tax would be based on the value of property at the time of the donor's death, which might conceivably have increased to such an extent that the tax would render his estate insolvent. Placed in this situation,

the donor could do nothing to relieve his estate from liability for the Estate Tax, unless he subjected himself to the Gift Tax by releasing the power—a tax which would be based on the value of the property at the time of the relinquishment of the power. Such a hardship would be avoided by the logical application of the principle of statutory construction applied by this Court in the *Welch case.*

Conclusion.

It is, therefore, respectfully submitted that the transfers in trust made by decedent may not be included in his gross estate under Section 302 (d) of the Revenue Act of 1926, as amended by the Revenue Act of 1934.

This petition for a writ of certiorari should be granted and the judgment of the Circuit Court of Appeals should be reversed; because that decision conflicts in principle with the decisions of this Court in the *Sanford case* and the *Welch case* and because it conflicts with the nation-wide administrative practice of the Treasury Department in determining whether transfers in trust with reserved powers are subject to the Gift Tax or the Estate Tax.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX.

SECTION 302 (d) OF THE REVENUE ACT OF 1926 (44 STAT. 71), AS AMENDED BY THE REVENUE ACT OF MAY 10, 1934 (48 STAT. 752).

"Section 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

"(a) * * *

"(b) * * *

"(c) * * *

"(d)(1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

"(2) For the purposes of this subdivision the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such

cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death."

[Sub-section (2) was added by the Revenue Act of May 10, 1934. The provisions of Sub-section (1) were contained in the Act of 1926 before the Amendment].

REGULATIONS 79

Relating To

FEDERAL GIFT TAX

Article 3, as amended by T. D. 5010, approved September 19, 1940 [1941 C. C. H. Inheritance, Estate, and Gift Tax Service, Sec. 3936]. The paragraphs in italics were added by the amendment embodied in T. D. 5010 [Internal Revenue Bulletin, Sept. 30, 1940, p. 13]:

"Art. 3. Cessation of donor's dominion and control. —The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

"As to any property, or part thereof or interest therein, of which the donor has so parted with dominion

and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and their scope determined.

"A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. Thus, the transfer of an estate for life where, by an exercise of the power, the estate may be terminated or cut down to one of less value, and without restriction upon the extent to which the estate may be so cut down, constitutes an incomplete gift. Modifying the example by treating the power as confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete.

"A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the cor-

pus to such donee at the termination of the period, constitutes a completed gift.

"A donor shall be considered as himself having the power where it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. A trustee, as such, is not a person having an adverse interest in the disposition of the trust property or its income.

"The relinquishment or termination of a power to change the disposition of the transferred property, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the power, and constitutes a gift of such income or of such other enjoyment taxable as of the calendar year of its receipt.

"If the donor contends that the power is of such nature as to render the gift incomplete, and hence not subject to the tax as of the calendar year of the initial transfer, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument of transfer, should be submitted.

"If for any calendar year prior to the calendar year 1939 a transfer has been subjected to payment of the tax despite the fact that the donor retained a power to name new beneficiaries or to change the interests of the beneficiaries as between themselves, and if the tax for such calendar year has been finally determined on such basis,

and for all gift tax purposes such transfer has been treated, for such calendar year and each subsequent calendar year, as subject to the tax, and the donor agrees, in a closing agreement executed under the provisions of section 3760, that he will continue so to treat such transfer, then the relinquishment or termination of the power so retained by the donor shall not be treated as a gift subject to the tax."

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315201—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 964

WILLIAM LARIMER MELLON AND THOMAS MELLON, EXECUTORS OF THE WILL OF JAMES R. MELLON, DECEASED, PETITIONERS

v.

WILLIAM DRISCOLL, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 2–14) is unreported. The opinion of the Circuit Court of Appeals (R. 22–28) is reported in 117 F. (2d) 477.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 3, 1941. (R. 28.) The petition for a writ of certiorari was filed on April 18,

1941. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Prior to the enactment of Section 302 (d) of the Revenue Act of 1926, the decedent established two spendthrift trusts. In each a child was given the income for life and a testamentary power to dispose of the principal; if the power was not exercised, the principal would go to the life beneficiary's heirs under the intestacy laws of Pennsylvania. The decedent, however, reserved the power to revoke each trust, after six months' notice, in which event the principal would be distributed to the life beneficiary and the trust would end. The question is whether by virtue of this reservation the decedent's interests in the trust were properly included in his gross estate under Section 302 (d) of the Revenue Act of 1926, as amended.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 9–14.

STATEMENT

The decedent, James R. Mellon, died October 20, 1934. (R. 3.) In 1917, he had created two trusts, one for the benefit of each of his children, Thomas R. Mellon and S. Lucille Mellon Grange. (R. 4–5.)

The trustee in each instance was directed to pay the income to the child for life, and upon the child's

death to distribute the principal and undistributed income to such persons as the life beneficiary designated by his last will and testament. In the absence of such direction, the trustee was directed to distribute the property to such persons as would take as the life beneficiary's heirs under the intestacy laws of Pennsylvania. (R. 16, 18.)

Each trust provided that (R. 16, 18):

> Neither the principal of the said trust estate nor the income thereof shall in any manner be liable to the control or answerable for the debts, contracts, engagements or torts of the said cestui que trust, or liable to any charge, assignment, conveyance or anticipation by him [her].

It was also provided in each trust that (R. 16–17, 19):

> The party of the first part hereby reserves the right after six months written notice of his intention so to do, served on the party of the second part, to revoke this trust, whereupon the principal of the trust fund shall be distributed to Thomas Mellon [S. Lucille Mellon Grange] and the trust shall end.

The Commissioner of Internal Revenue included in the decedent's gross estate the value of the trust funds less the value of the life estates, and determined a deficiency accordingly. (R. 5–6.) The petitioners, executors under the decedent's will, brought suit to recover the tax paid pursuant thereto. The Circuit Court of Appeals affirmed

a judgment of the District Court in favor of the Collector. (R. 28.)

ARGUMENT

The case presents a routine tax question, which was correctly decided by the courts below. The petitioners' claims that the decision is in conflict with *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, and current administrative practice are without foundation. No conflict among the circuits is asserted. Accordingly, there is no occasion for further review.

1. It is plain that the enjoyment of the trust properties was at the decedent's death, subject to "change" through the exercise of a power "to alter, amend, or revoke" within the meaning of Section 302 (d) of the Revenue Act of 1926, as amended by Section 401 of the Revenue Act of 1934. Under the trusts, the decedent's children had a non-alienable right to the income for life and a testamentary power of appointment over the principal. If, on the other hand, the decedent's powers of revocation were exercised, the children would acquire unrestricted ownership of the trust estate. Thereafter they would have an unqualified right to the use of both principal and income, including the right of alienation *inter vivos* as well as testamentary; at the same time, they would lose the protection accorded them by the trusts against the claims of creditors. These differences between the interests of beneficiaries

of spendthrift trusts and absolute ownership are substantial.

2. The reserved powers were not outside the purview of the statute because their exercise would "terminate" the trusts. In common usage, there is no difference in substance between termination and revocation, and the trusts themselves describe the power as one to "revoke." If, however, the term "revoke" is construed to require a revesting of the estate in the settlor, the power here reserved would nevertheless be within the statute as one to "alter" the enjoyment of the property. See Regulations 80, Article 20, as amended by Treasury Decision 4729, Appendix, *infra*. Cf. *Commissioner* v. *Chase Nat. Bank*, 82 F. (2d) 157 (C. C. A. 2d), certiorari denied, 299 U. S. 552; *Holderness* v. *Commissioner*, 86 F. (2d) 137 (C. C. A. 4th); *Hoblitzelle* v. *United States*, 3 F. Supp. 331 (C. Cls.).

The argument that the statute did not include a power to terminate was made in *White* v. *Poor*, 296 U. S. 98, but the Court did not decide the point. In order that the question "should be set at rest", the statute was amended in 1936 specifically to include the word "terminate" after the words "alter, amend, or revoke". Revenue Act of 1936, Section 805.[1] The report of the House Committee on Ways

[1] The amendment, which was adopted in the Revenue Act of 1936 (H. R. 12395, 74th Cong., 2d Sess.), was originally introduced in the House as part of H. R. 12793, 74th Cong., 2d Sess., and was added to the 1936 Act in the Senate.

and Means expressed the belief that the amendment was merely declaratory of existing law,[2] and this has also been the interpretation given the amendment by the Treasury. Regulations 80, Article 20, as amended by T. D. 4729, Appendix, *infra*.

3. The petitioners' contention that the transfers were not subject to any power at the date of decedent's death because he had never given the six months' written notice required by the trusts is likewise without merit. The notice requirement was merely an incident to the exercise of the power which in nowise affected its substance. Any conceivable doubt on the question, however, is removed by the express provisions of the 1934 amendment to Section 302 (d). Revenue Act of 1934, Section 401. This amendment, designed to clarify existing law,[3] was in effect at the time of the decedent's death, and is plainly applicable.

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[2] H. Rep. No. 2818 on H. R. 12793, 74th Cong., 2d Sess., p. 10:

> Another change made in subsection (a) of section 206 has been to expressly include a power to terminate along with the powers to alter, amend, or revoke. In the case of *White* v. *Poor*, *supra*, the Supreme Court did not pass on the question of whether the power to terminate was included in the language relating to a power "to alter, amend or revoke." Since in substance a power to terminate is the equivalent of a power to revoke, this question should be set at rest. Express provision to that effect has been made and it is believed that it is declaratory of existing law.

[3] H. Rep. No. 704 on Revenue Act of 1934, 73d Cong., 2d Sess. (1939–1 Cum. Bull. Part 2), 581); Sen. Rep. No. 558 on Revenue Act of 1934, 73d Cong., 2d Sess. (1939–1 Cum. Bull. (Part. 2), 620).

The petitioner's argument, based on *Hassett* v. *Welch,* 303 U. S. 303, that the 1934 amendment does not apply to prior transfers, overlooks the fact that there the Court was concerned with the retroactive application of an amendment to Section 302 (c) taxing transfers in contemplation of death or intended to take effect in possession or enjoyment at death. The taxable event under Section 302 (d) is not the prior transfer but the termination by death of the reserved power. *Porter* v. *Commissioner,* 288 U. S. 436. Consequently, there is no retroactive application.

Moreover, application of the amendment is neither unfair nor arbitrary. The decedent was clearly put upon notice by the adoption of the amendment and he had ample opportunity to avoid the tax by releasing the power prior to his death. *Commissioner* v. *Chase Nat. Bank, supra; Witherbee* v. *Commissioner,* 70 F. (2d) 696 (C. C. A. 2d), certiorari denied, 293 U. S. 582.

4. The petitioners' contention that the decision of the court below conflicts with *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, and current Treasury Regulations pertaining to the gift tax is based upon an incorrect premise, namely, that the estate tax and gift tax statutes must be construed as mutually exclusive except for transfers in contempla-

tion of death. The *Sanford* opinion implies other exceptions, and they unquestionably exist. For example, although transfers subject to a power of revocation exercisable jointly by the settlor and a person having an adverse interest are completed gifts (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339), they are nevertheless within the specific provisions of Section 302 (d) of the estate tax. *Helvering* v. *City Bank Co.*, 296 U. S. 85. While the statutes, to the extent appropriate, should be construed *in pari materia*, it does not follow, as the petitioners' contention assumes, that interpretations given the general language of the gift tax should limit the precise definitions employed in the estate tax. Accordingly, whether or not the decedent's transfers would have constituted a completed gift for purposes of a gift tax, there is no inconsistency which is not contemplated by the statutes and the relevant decisions.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
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Special Assistants to the Attorney General.

MAY, 1941.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

* * * * *

(U. S. C., Title 26. Sec. 411.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 401. REVOCABLE TRUSTS.

Section 302 (d) of the Revenue Act of 1926 is amended to read as follows:

"(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any per-

son, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

"(2) For the purposes of this subdivision the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

* * * * *

(U. S. C., Title 26, Sec. 411.)

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 805. ESTATE TAXES — REVOCABLE TRANSFERS.

(a) Section 302 (d) (1) of the Revenue Act of 1926, as amended, is amended to read as follows:

"(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment

thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death."

(b) Except in the case of transfers made after the date of the enactment of this Act, no interest of the decedent of which he has made a transfer shall be included in the gross estate under such section 302 (d) (1) unless it was includible under such section before its amendment by this section.

Treasury Regulations 80, as amended by T. D. 4729 (1937–1 Cum. Bull. 286–287):

ART. 20. *Transfers with power to change the enjoyment.*—(*a*) *Transfers included.*—Subdivision (d) of section 302 of the Revenue Act of 1926, as amended, embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate.

* * * * *

The third change made in the subdivision by the Revenue Act of 1936 consisted of the addition of the words "or terminate" following the words "to alter, amend, re-

voke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

(*b*) *Taxability.*—The property or the interest or interests therein so transferred shall be included in the gross estate if coming within any one of the following paragraphs:

(1) Regardless of when the transfer was made, if the decedent died after the enactment of the Revenue Act of 1916 (September 8, 1916), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and any adverse interest which was not substantial.

(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4.01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the decedent's

death occurred at any time subsequent to the transfer, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

(3) When the transfer was made and the decedent died after June 22, 1936 (the date of the enactment of the Revenue Act of 1936), and the power was either reserved at the time of the transfer or later created or conferred, without regard to the source from which the power was acquired, and whether exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

* * * * *

The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death though the exercise of the power was subject to a precedent giving of notice, or though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised, or though the exercise of the power was restricted to a particular time or the happening of a particular event which had not arrived or oc-

curred at decedent's death. When determining the value of the gross estate in such cases the full value of the property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. (See article 13 (10).)

U. S. GOVERNMENT PRINTING OFFICE: 1941